Supreme Court, U.S.
FILED
OCT 22 1997
CLERK

(2)

No. 97-326

In The
Supreme Court of the United States
October Term, 1997

ORLEANS PARISH SCHOOL BOARD,
Petitioner,

vs.

UNITED STATES GYPSUM COMPANY, ET AL.,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

James C. Gulotta, Jr.*
Barry W. Ashe
Mary L. Dumestre
Counsel for Respondent
W.R. Grace & Co.-Conn.
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, Louisiana 70130
(504) 581-3200

*Counsel of Record

41 pp

QUESTION PRESENTED

Whether this Court's limitation on the *Ex parte Young* exception to sovereign immunity articulated in *Idaho v. Coeur d'Alene Tribe of Idaho,* ___ U.S. ___, 117 S.Ct. 2028 (1997), and this Court's discussion of sovereign status in the context of a Tenth Amendment analysis in *Printz v. United States,* ___ U.S. ___, 117 S.Ct. 2365 (1997), warrant overturning the precedents of the United States Fifth Circuit Court of Appeals in *Minton v. St. Bernard Parish School Board,* 803 F.2d 129 (5th Cir. 1986) and *Moore v. Tangipahoa Parish School Board,* 594 F.2d 489 (5th Cir. 1979), that Louisiana parish school boards are not "arms" or "alter egos" of the State.

LIST OF RELATED PARTIES

W.R. Grace & Co.-Conn. is the respondent and only remaining defendant herein. In accordance with Supreme Court Rule 29.6, respondent states as follows:

1. W.R. Grace & Co. is the parent company of W.R. Grace & Co.-Conn.

2. W.R. Grace & Co.-Conn.'s nonwholly owned subsidiaries are:

a. A-1 Bit & Tool Co., Inc.
b. Alewife Boston Ltd.
c. Amicon, Inc.
d. Auragen, Inc.
e. CCHP, Inc.
f. Circe Biomedical, Inc.
g. Coalgrace, Inc.
h. Coalgrace II, Inc.
i. Five Alewife Boston Ltd.
j. GEC Management Corporation
k. GN Holdings, Inc.
l. GPC Thomasville Corp.
m. Gloucester New Communities Company, Inc.
n. Grace A-B Inc.
o. Grace A-B II, Inc.
p. Grace Drilling Company
q. Grace H-G Inc.
r. Grace H-G II Inc.
s. Grace Offshore Company
t. W.R. Grace Capital Corporation
u. Gracoal, Inc.
v. Gracoal II, Inc.
w. Homco International, Inc.
x. Woolwich Sewer Company, Inc.
y. Woolwich Water Co., Inc.

TABLE OF CONTENTS

Page

Question Presented i

List of Related Parties ii

Table of Contents iii

Table of Authorities v

STATEMENT OF THE CASE 3

I. Introduction 3

II. Statement of Facts 4

III. The Proceedings Below 6

REASONS TO DENY THE WRIT 8

I. The Fifth Circuit Analyses In *Minton* And *Moore* Were Correct And Need Not Be Revisited 9

II. Based Upon The Analysis Formulated In *Mt. Healthy*, And The Specific Empowering Constitutional Provisions And Statutes, Louisiana Parish School Boards Are Not "Arms" Or "Alter Egos" Of The State 13

III. The Orleans Parish School Board Did Not Function As An Arm Of The State By Relying Upon The Louisiana Educational Facilities Asbestos Detection Program 20

IV. With Few Exceptions, County, District, And City School Boards And Districts Are Not "Arms" Or "Alter Egos" Of Their Respective States 22

V. The Constitutional Principles Discussed In The Recent Decisions In *Coeur D'Alene* and *Printz* Do Not Change The Outcome In the Instant Case 26

CONCLUSION 28

APPENDIX

Appendix A -- Order and Reasons of the United States District Court for the Eastern District of Louisiana dated March 26, 1990 . . . . . 1a

Appendix B -- Per Curiam Decision of the United States Court of Appeals, Fifth Circuit dated November 4, 1993 . . . . . 6a

TABLE OF AUTHORITIES

Page

Cases Cited:

Abrams v. Citibank, N.A., 537 F.Supp. 1192 (S.D.N.Y. 1982) 19

Adams v. Rankin County Board of Education, 524 F.2d 928 (5th Cir. 1975), *cert. denied*, 438 U.S. 904, 98 S.Ct. 3121 (1978) 25

Ambus v. Granite Board of Education, 975 F.2d 1555 (10th Cir. 1992), *affirmed on rehearing*, 995 F.2d 992 (1993) 24

Ames v. Kansas, 111 U.S. 449, 4 S.Ct. 437, 28 L.Ed. 482 (1884) 19

Bertot v. School District No. 1, 613 F.2d 245 (10th Cir. 1979) 25

California v. Steelcase, Inc., 792 F.Supp. 84 (C.D. Cal. 1992) 20

Cline v. School District No. 32, 476 F.Supp. 868 (D. Neb. 1979) 26

Edelman v. Jordan, 415 U.S. 651, 97 S.Ct. 1347, 39 L.Ed.2d 662 (1974) . 19

Idaho v. Coeur d'Alene Tribe of Idaho, ___ U.S. ___, 117 S.Ct. 2028 (1997) 2, 4, 26, 27

Jacintoport Corp. v. Greater Baton Rouge Port Comm'n, 762 F.2d 435 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057, 106 S.Ct. 797 (1986) 19

Kenny v. Board of Trustees, 563 F.Supp. 95 (D. Mont. 1983) 26

Lester H. by Octavia P. v. Gilhool, 916 F.2d 865 (3d Cir. 1990), *cert. denied*, 499 U.S. 923, 111 S.Ct. 1317 (1991) 24

Minton v. St. Bernard Parish School Board, 803 F.2d 129 (5th Cir. 1986) 2, 8, 9, 10, 11, 27, 28

Moor v. County of Almeda, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973) 8

Moore v. Abbott Lab., Inc., 900 F.Supp. 26 (S.D. Miss. 1995) 19

Moore v. Tangipahoa Parish School Board, 594 F.2d 489 (5th Cir. 1979) 2, 9, 10, 27, 28

Mt. Healthy City School District v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) 2, 8, 9, 12, 13, 27, 28

PYCA Industries, Inc. v. Harrison County Waste Water Management Dist., 81 F.3d 1412 (5th Cir. 1996) 9

Printz v. United States, ___ U.S. ___, 117 S.Ct. 2365 (1997) 3, 4, 26, 27

Rosa R. v. Connelly, 889 F.2d 435 (2d Cir. 1989), *cert. denied*, 496 U.S. 941, 110 S.Ct. 3225 (1990) 25

Smith v. Travis County Educ. Dist., 791 F.Supp. 1170 (W.D. Tex. 1992) 26

Stewart v. Baldwin County Board of Education, 908 F.2d 1499 (11th Cir. 1990) 24

Tradigrain, Inc. v. Mississippi State Port Authority, 701 F.2d 1131 (5th Cir. 1983) 9

Travelers Indemnity Company v. School Board of Dade County, Fla., 666 F.2d 505 (11th Cir.), *cert. denied*, 459 U.S. 834, 103 S.Ct. 77 (1982) 23, 24

Unified School District No. 480 v. Epperson, 583 F.2d 1118 (10th Cir. 1978) 22

Unified School District No. 480 v. Epperson, et al., 551 F.2d 254 (10th Cir. 1977) 22

Vermont v. Oncor Communications, Inc., 166 F.R.D. 313 (D. Ver. 1996) 19

Statutes Cited:

La. Const. of 1974, art. 8, § 3(A) 17

La. Const. of 1974, art. 8, § 9 14

La. Const. of 1974, art. 8, § 13 . . . . . 11, 17, 18

La. Const. of 1974, art. VI, § 44 14

La. R.S. § 17:10 21

La. R.S. § 17:11 21

La. R.S. § 17:51 . . . . . 12, 14

La. R.S. § 17:54 14

La. R.S. § 17:81 . . . . . 4, 5, 11, 12, 14, 16

La. R.S. § 17:87.6 . . . . . 4, 16

La. R.S. § 17:89 16

La. R.S. § 17:127 17

La. R.S. § 17:3701 20

La. R.S. § 17:3702 21

U.S. Const. amend. XI 1

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent requests the Court to deny the petition for writ of certiorari, which seeks a ruling on an issue never previously raised by petitioner in the eight years since this case was removed to federal court.[1] After all of petitioner's claims against respondent were dismissed by the United States Court of Appeals for the Fifth Circuit as time barred under the applicable Louisiana statute of limitations, petitioner, a Louisiana parish school board, contends for the first time that it is an "arm" of the State entitled to Eleventh Amendment immunity from having its claims adjudicated in federal court.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted *against one of the United States* by Citizens of another State, or by Citizens or Subjects of any Foreign State.[2]

The Eleventh Amendment prohibition of federal jurisdiction over a suit "commenced or prosecuted against one of the United States" has no application to a lawsuit *brought by* a Louisiana parish school board. Moreover, petitioner neglects to inform the Court that the United States

---

1 On September 12, 1997, respondent was granted a 30-day extension of time within which to file this brief in opposition to the petition for writ of certiorari.

2 U.S. Const. amend. XI (emphasis added).

Court of Appeals for the Fifth Circuit, in at least two cases decided in 1979[3] and 1986,[4] consistently has held that Louisiana parish school boards are not eligible for Eleventh Amendment immunity because they are not "arms" or "alter egos" of the State. The Fifth Circuit based its decisions in both cases on the criteria articulated by this Court in the leading case on the eligibility of a political subdivision for Eleventh Amendment immunity, *Mt. Healthy City School District v. Doyle,*[5] a case cited by petitioner as controlling this case. If *Mt. Healthy* controls this case, then so do the directly applicable Fifth Circuit precedents that were decided on the basis of *Mt. Healthy*, and that petitioner did not see fit to challenge in two previous hearings of this case by the Fifth Circuit itself. Nor does petitioner directly challenge the Fifth Circuit precedents in its petition to this Court. Petitioner does not even cite or refer to them.

Every relevant factor bearing on Eleventh Amendment immunity with regard to Louisiana parish school boards has been considered by the Fifth Circuit and resolved against immunity. In contrast, nothing relating either to the responsibility of the Louisiana Board of Elementary and Secondary Education (BESE) or to the purposes of the Louisiana Educational Facilities Asbestos Detection Program, to which petitioner refers in its petition, supports petitioner's contention that it should be deemed an "arm" or "alter ego" of the State. Finally, nothing in this Court's recent decisions in the cases of *Idaho v. Coeur d'Alene Tribe*

---

3 *Moore v. Tangipahoa Parish School Board,* 594 F.2d 489 (5th Cir. 1979).

4 *Minton v. St. Bernard Parish School Board,* 803 F.2d 129 (5th Cir. 1986).

5 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

of Idaho and *Printz v. U.S.*, on which petitioner relies to explain its belated assertion of immunity, alters the test applicable to determine eligibility of political subdivisions for Eleventh Amendment immunity. The Orleans Parish School Board's petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

I. Introduction

In 1988, petitioner Orleans Parish School Board ("School Board"), filed an action in Louisiana state court against respondent, W.R. Grace & Co.-Conn. ("Grace"), and a multitude of other former asbestos-containing product manufacturers, seeking to recover for the expenses incurred and to be incurred by the School Board to remove asbestos-containing materials from certain elementary and secondary school buildings, all owned by the School Board and located in Orleans Parish, Louisiana. In January 1989, co-defendant National Gypsum Corporation, filed a removal petition based upon diversity jurisdiction, removing the case to the United States District Court for the Eastern District of Louisiana. The case has proceeded over the past eight years in federal court. All of the manufacturer defendants with the exception of Grace, have settled or were dismissed from the lawsuit. On May 22, 1997, the United States Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of the School Board's claims against Grace, based upon Louisiana's one-year statute of limitations with regard to the claims asserted.

The School Board now has filed a petition for writ of certiorari to this Court, asserting for the first time in eight years that it is immune from suit in federal court based upon the Eleventh Amendment. Petitioner asserts that the "issue was not presented to the district court or appellate court because it is based in large measure on the most recent pronouncements of this Court on state sovereignty principles," articulated in *Idaho v. Coeur d'Alene Tribe of Idaho*, ___ U.S. ___, 117 S.Ct. 2028 (1997) and *Printz v. United States*, ___ U.S. ___, 117 S.Ct. 2365, (1997).[6]

II. Statement of Facts

Throughout the 1950s, 1960s, and early 1970s, the School Board constructed various elementary and secondary school buildings through its statutory authority to buy and own property,[7] and to enter into contracts, independent of the State, for the management of the property and administration of the schools.[8] Parish school boards have extensive authority in this area:

> . . . City and parish boards may receive land by purchase or donation for the purpose of erecting school houses; provide for and secure the erection of same, construct such outbuildings and enclosures as shall be conducive to the protection of property, and

---

6 *See* Petition for Writ of Certiorari at p.2.

7 La. R.S. § 17:87.6.

8 *See* La. R.S. § 17:81.

> make repairs and provide for the necessary furniture, equipment and apparatus.
>
> . . . City and parish school boards have the power to recover for any damage that may be done to the property in their charge; they may change the location of the school house, sell or dispose of the old site, or of any site which for any reason can no longer be used or which is unused and unnecessary or unsuitable as such, and use the proceeds thereof for procuring a new one. **Provided that the Orleans Parish School Board shall have authority to prescribe the rules and regulations to govern the building, equipping and repairing of school houses, and the dates of the meetings of that board....**[9]

Consistent with the accepted practice in the construction industry at the time the schools were built, the specifications for the schools required that the buildings be constructed using various asbestos-containing products. Later, beginning in 1979, the United States Environmental Protection Agency ("EPA") advised school boards and districts across the United States of the EPA's concern for potential health effects posed by asbestos-containing products installed in schools in prior years. In response to the EPA information, the School Board took extensive measures to investigate and address the alleged problem, as described in

---

9 La. R.S. § 17:81 (emphasis added).

the opinion of the Fifth Circuit dated May 22, 1997,[10] and the Order and Reasons of the district court dated June 1995.[11] Because the School Board failed to file suit against asbestos-containing product manufacturers until several years after it began to address the presence of asbestos-containing products in its buildings, the district court dismissed the School Board's claims as time barred. The Fifth Circuit affirmed.

III. The Proceedings Below

The School Board admits that its alleged Eleventh Amendment immunity is being raised for the first time before this Court. Nevertheless, the proceedings below for the past eight years are pertinent to put this case in perspective.

The School Board filed its action in state court in August 1988. The removal petition, based upon diversity of citizenship, was filed in January 1989. Eleven months later, in December 1989, the School Board filed a Motion to Remand alleging that the "John Doe" architects cited but not served as defendants, destroyed diversity jurisdiction. In January 1990, the School Board filed a Motion for Leave to File an Amended Complaint, attempting to name, but failing to serve 23 non-diverse architects. The Motion for Remand

---

10 The Fifth Circuit's Opinion is reprinted in the Petition for Writ of Certiorari at App. 1.

11 The district court's Order and Reasons are reprinted in the Petition for Writ of Certiorari at App. 9.

was denied in March 1990.[12] In May 1990, the School Board requested an order certifying the denial of the Motion for Remand for appeal, based upon a dismissal of the non-diverse architects. After an initial dismissal of the appeal as premature, the Fifth Circuit ultimately heard the appeal.

The School Board's brief on appeal was directed to the propriety of joining the non-diverse architects to destroy diversity. At no point did the School Board allege that, as an "arm" or "alter ego" of the State, diversity was destroyed *ab intitio*, or raise the issue of Eleventh Amendment immunity. In November 1993, the Fifth Circuit affirmed the district court's denial of the Motion for Remand.[13]

The School Board's Petition for Rehearing was denied, and the case proceeded. The School Board settled with several defendants subsequent to resumption of the case in federal district court. In approximately 1994, the district court focused discovery on the statute of limitations issue, which resulted in a dismissal on summary judgment of the last remaining, non-settling defendant, respondent Grace. The dismissal was affirmed by the Fifth Circuit on May 22, 1997.[14]

---

12 The March 26, 1990 Order and Reasons of the United States District Court for the Eastern District of Louisiana is reprinted herein as Appendix A.

13 The November 4, 1993 Per Curiam Decision of the United States Court of Appeals, Fifth Circuit is reprinted herein as Appendix B.

14 *See* Petition for Writ of Certiorari at App. 1.

REASONS TO DENY THE WRIT

The issue before this Court does not involve a conflict among the circuits or a case of first impression requiring resolution by this Court. Rather, the issue is the simple analysis of the status of a parish school board in Louisiana to determine whether petitioner is an "arm" or "alter ego" of the State, thereby either destroying diversity jurisdiction or invoking Eleventh Amendment immunity.[15]

If the School Board is a political subdivision of the State of Louisiana and not the "alter ego" of the State, diversity of citizenship jurisdiction is secure.[16] It also follows that a political subdivision that is not an "arm" or "alter ego" of the state does not enjoy Eleventh Amendment immunity.[17]

Whether a Louisiana parish school board is the "alter ego" of the state has been decided by the United States Fifth Circuit Court of Appeals in *Minton v. St. Bernard Parish*

---

15 A state is not a citizen of itself. Accordingly, diversity of citizenship jurisdiction cannot exist when the state is a party. *Moor v. County of Almeda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973).

16 "[A] political subdivision of a State, unless it is simply 'the arm or *alter ego* of the State,' is a citizen of the State for diversity purposes." *Moor*, 411 U.S. at 717, 93 S.Ct. at 1800.

17 *See Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

School Board[18] and in *Moore v. Tangipahoa Parish School Board.*[19] Applying this Court's analysis in *Mt. Healthy City School District v. Doyle*,[20] the Fifth Circuit concluded without doubt that Louisiana parish school boards are not "arms" or "alter egos" of the state. The same six-part test applied by the Fifth Circuit in the Eleventh Amendment context is appropriate to reach the conclusion that Louisiana parish school boards are not "arms" or "alter egos" of the State for diversity purposes.[21]

I. The Fifth Circuit Analyses In *Minton* And *Moore* Were Correct And Need Not Be Revisited.

In both *Minton v. St. Bernard Parish School Board*[22] and *Moore v. Tangipahoa Parish School Board,*[23] the Fifth Circuit reviewed the nature of Louisiana parish school

---

18 803 F.2d 129 (5th Cir. 1986) (in Eleventh Amendment context).

19 594 F.2d 489 (5th Cir. 1979) ("*Mt. Healthy* Straight Up").

20 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

21 The analysis of the status of a political subdivision "'is virtually identical whether the case involves determination of immunity under the Eleventh Amendment or a determination of citizenship for diversity jurisdiction.'" *PYCA Industries, Inc. v. Harrison County Waste Water Management Dist.*, 81 F.3d 1412 (5th Cir. 1996), *quoting Tradigrain, Inc. v. Mississippi State Port Authority,* 701 F.2d 1131 (5th Cir. 1983).

22 803 F.2d 129 (5th Cir. 1986).

23 594 F.2d 489 (5th Cir. 1979).

boards and concluded that the parish school boards were not "arms" or "alter egos" of the State.

Citing the analysis in *Mt. Healthy,* the *Moore* court affirmed the district court's conclusion that the board was not an "arm" of the state with Eleventh Amendment immunity, quoting from the district court opinion:

> "Louisiana school boards, such as the defendant, have the power to sue and be sued. They have the power to contract. They have the power to purchase, hold and sell property. They have the power to borrow funds. They have the power to, and in fact do, levy and collect taxes from which back pay claims can be met.
>
> Both the Louisiana courts and federal district courts in Louisiana have consistently held that school boards are autonomous political subdivisions and not the alter ego of the state from the standpoint of sovereign immunity."[24]

In *Minton,* the Fifth Circuit addressed the issue with regard to the St. Bernard Parish School Board, a board created and empowered under the same state laws as petitioner, Orleans Parish School Board, and the defendant in *Moore*. The *Minton* court noted that the analysis performed was necessary to determine if the board enjoyed Eleventh Amendment immunity or, rather, possessed "an identity sufficiently distinct from that of the State of

---

24 594 F.2d at 493-94 (citations omitted).

Louisiana to place it beyond that shield."[25] The court cited the relevant factors:

> (1) whether state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.[26]

Performing this analysis, the court noted that:

> These tests identify parish school boards as local independent agents not shielded by the state's eleventh amendment immunity. Although Louisiana courts have referred to school boards as "agencies" of the state, this characterization does not amount to an assertion that the boards are arms of the state within the meaning of the eleventh amendment. School boards generate funds for the operation of parish school districts through local *ad valorem* taxation, [La. Const. art. 8, § 13] exercise a great deal of discretion in performing their functions and addressing their innately local concerns, [La.

---

25 A political subdivision possessing an identity distinct from that of the State supports diversity jurisdiction.

26 803 F.2d at 131.

> Rev. Stat. Ann. § 17:81 (West 1986 Supp.)] have authority to sue or be sued in their own name, [La. Rev. Stat. Ann. §§ 17:51 and 17:81 (West 1982 and 1986 Supp.)] and can hold, use, or sell property as each local board determines necessary to fulfill its obligation to the public. [La. Rev. Stat. Ann. § 17:81 (G) & (H) (West 1986 Supp.)] In view of the inherently local nature of the interests of Louisiana school boards, the wide degree of local autonomy they are granted under state law, and the predominantly local nature of their funding, it cannot be said either that these entities are mere arms of the state or that monetary judgments against them would represent indirect impositions on the state treasury interfering with the state's fiscal autonomy. Louisiana school boards, therefore, are not entitled to eleventh amendment immunity to Section 1983 claims.[27]

Louisiana parish school boards retain identities "sufficiently distinct from that of the state" to preclude any finding that school boards such as petitioner are "arms" or "alter egos" of the State, as is evident from a review of the *Mt. Healthy* factors in relation to the specific constitutional provisions and statutes empowering the Louisiana parish school boards.

---

27 *Id.* at 131-32 (footnotes omitted).

II. Based Upon The Analysis Formulated In *Mt. Healthy*, And The Specific Empowering Constitutional Provisions And Statutes, Louisiana Parish School Boards Are Not "Arms" Or "Alter Egos" Of The State.

In *Mt. Healthy City School District v. Doyle*, this Court addressed a contention by an Ohio school district that it was entitled to Eleventh Amendment immunity as an arm of the state.[28] Noting that "[t]he answer depends, at least in part, upon the nature of the entity created by state law," the *Mt. Healthy* court considered the status under state law of political subdivisions such as local school districts; that the school district was "but one of many local school boards within the State of Ohio"; that the school district was "subject to some guidance from the State Board of Education"; and that the district received a "significant amount of money from the State," but had "extensive powers to issue bonds . . . and to levy taxes" as restricted by State law.[29] Balancing these factors, the Court held that the school district was not an arm of the state, and therefore, not entitled to Eleventh Amendment immunity.

Applying the preceding test to Louisiana parish school boards, it is apparent, as the Fifth Circuit consistently has held, that Louisiana parish school boards are political

---

28 429 U.S. at 280, 97 S.Ct. at 572.

29 *Id.* at 280, 97 S.Ct. at 572-73.

subdivisions of the state and are not "arms" or "alter egos" of the state for any purpose.[30]

Parish school boards are entities established by the Louisiana legislature at Louisiana Revised Statutes § 17:51, *et seq.*, pursuant to Article 8, § 9 of the Louisiana Constitution, which provides: "The legislature shall create parish school boards and provide for the election of their members."

The legislature provided that a parish school board be established for each of the state parishes, and that each parish school board shall be a corporate entity, with the power to sue and be sued.[31] The parish school board members are elected by the qualified voters of a particular parish, each city or parish school board elects from among its members its president, vice president, and has the authority to fix the terms of office of the president and vice president, not to exceed four years.[32]

The autonomy of the parish school boards is further defined in La. R.S. § 17:81, which provides for the general powers of city and parish school boards. Each city and parish school board has the power to:

> . . . determine the number of schools to be opened, the location of school houses, the

---

30 The School Board admits in its brief that Section 44 of Article VI of the Louisiana Constitution defines parish school boards as political subdivisions. *See* Petition for Writ of Certiorari at pp. 11-12.

31 La. R.S. § 17:51.

32 La. R.S. § 17:54.

number of teachers to be employed, and select such teachers from nominations made by the city or parish superintendent . . . .

The boards shall have authority to employ teachers . . . and to fix their salaries.

. . .

Each city or parish school board shall exercise proper vigilance in securing for the schools of the district all funds destined for the support of the schools, including the state funds apportion [sic] thereto, and all other funds.

. . .

. . . [A] city or parish school board shall have the authority, if otherwise applicable, to apply for, receive, and expend funds from public and private sources. . .

City and parish school boards may receive land by purchase or donation for the purpose of erecting school houses; provide for and secure the erection of same, construct such outbuildings and enclosures as shall be conducive to the protection of property, and make repairs and provide for the necessary furniture, equipment and apparatus.

City and parish school boards have the power to recover for any damage that may be done to the property in their charge; they may

> change the location of the school house, sell or dispose of the old site, or of any site which for any reason can no longer be used or which is unused and unnecessary or unsuitable as such, and use the proceeds thereof for procuring a new one. **Provided that the Orleans Parish School Board shall have authority to prescribe the rules and regulations to govern the building, equipping and repairing of school houses, and the dates of the meetings of that board. . . .**[33]

A "school board may sell, lease or otherwise dispose of, at public or private sale, for cash or on terms of credit, any school site, building, facility or personal property which is not used and, in the judgment of the school board, is not needed in the operation of any school or schools within its jurisdiction."[34] Parish school boards also have authority to borrow money to meet their budget or expenditures for the upcoming school year.[35]

Notwithstanding the extensive degree of autonomy established for the strictly local parish school boards, petitioner contends that the Louisiana State Board of Elementary and Secondary Education ("BESE") has sufficient power and control over the "sixty-six local [parish] school boards" to establish that the individual parish boards

---

33 La. R.S. § 17:81 (emphasis added).

34 La. R.S. 17:87.6.

35 La. R.S. 17:89.

are "arms" or "alter egos" of the State.[36] While BESE is empowered to "supervise and control the public elementary and secondary schools,"[37] Louisiana's constitution specifically excludes from BESE's powers control at the local level. Indeed, the drafters of the constitution emphasized that BESE "shall have no control over the business affairs of parish or city school board or selection or removal of its officers and employees."[38]

Rather, BESE is directed, by the constitution, to "develop and adopt a formula which shall be used to determine the cost of a *minimum* foundation program of education in all public elementary and secondary schools as well as to equitably allocate the funds to parish and city school systems."[39] This formula shall be developed annually, and "shall provide for a *contribution by every city and parish school system.*"[40] The "[l]ocal funds for the board of elementary and secondary schools shall be derived from sources specified in the Constitution."

The Orleans Parish School Board is particularly directed to "secure its revenues as provided in the Constitution of the state."[41] For the Orleans Parish School Board, the Louisiana Constitution specifically provides:

---

36 *See* Petition for Writ of Certiorari at p.9.

37 La. Const. of 1974, Article 8, § 3(A).

38 *Id.*

39 La. Const. of 1974, Article 8, § 13(A) (emphasis added).

40 *Id.* (emphasis added).

41 La. R.S. 17:127.

> The Orleans Parish School Board shall levy annually a tax not to exceed thirteen mills on the dollar of the assessed valuation of property within the City of New Orleans assessed for city taxation, and shall certify the amount of the tax to the governing authority of the city. The governing authority shall have the tax entered on city tax rolls. The tax shall be collected in the manner, under the conditions, and with the interest and penalties prescribed by law for city taxes. The money thus collected shall be paid daily to the Orleans Parish School Board.[42]

In addition, the constitution provides:

> For giving additional support to public elementary and secondary schools, any parish, school district, or subschool district, or any municipality or city school board which supports a separate city system of public schools may levy an ad valorem tax for a specific purpose, when authorized by a majority of the electors voting in the parish, municipality, district, or subdistrict in an election held for that purpose. The amount, duration, and purpose of the tax shall be in accord with any limitation imposed by the legislature.[43]

---

42 La. Const. of 1974, Article 8, § 13(C).

43 *Id. (C)*.

Based upon the degree of autonomy of the Louisiana parish school boards, including but not limited to a board's wholly local control over its business affairs and authority to levy taxes without State intervention, the Orleans Parish School Board plainly is not an "arm" or "alter ego" of the State under any analysis. Without doubt, in the context of this litigation, where petitioner, as the plaintiff, sued under its independent status to *recover* alleged damages for its own coffers and the basis for its claims arise out of the exercise of its wholly local administrative powers to own and manage property and construct schools independent of state intervention, the Orleans Parish School Board acted as an independent political subdivision and not as an "arm" of the State.[44]

---

44 One of the primary factors consistently considered in the analysis to determine whether a defendant is an "arm" or "alter ego" of the state is whether the state will be called to pay the judgment. *See, e.g., Jacintoport Corp. v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057, 106 S.Ct. 797 (1986) ("To shield states' treasures is one of the most important goals of the Eleventh Amendment immunity."), *citing Edelman v. Jordan*, 415 U.S. 651, 97 S.Ct. 1347, 39 L.Ed.2d 662 (1974). With petitioner as the *plaintiff* in a lawsuit with no counterclaims filed, the treasury of the State of Louisiana will not be called to pay in response to any order by the federal court in this proceeding. The mere fact that petitioner is the *plaintiff* in this lawsuit should itself negate application of the Eleventh Amendment, which precludes suit in federal court *against* a state. *See, e.g., Ames v. Kansas*, 111 U.S. 449, 4 S.Ct. 437, 28 L.Ed. 482 (1884) (suit brought by state may be removed to federal court); *Vermont v. Oncor Communications, Inc.*, 166 F.R.D. 313 (D. Ver. 1996) (Eleventh Amendment does not bar removal to federal court when the state is a plaintiff); *Abrams v. Citibank, N.A.*, 537 F.Supp. 1192 (S.D.N.Y. 1982) (action may be removed even if state is a plaintiff). *But see Moore v. Abbott Lab., Inc.*, 900 F.Supp. 26 (S.D. Miss. 1995) (Eleventh Amendment bars

III. The Orleans Parish School Board Did Not Function As An Arm Of The State By Relying Upon The Louisiana Educational Facilities Asbestos Detection Program.

Petitioner contends that because this lawsuit allegedly evolved from the School Board's reliance upon a statutory scheme entitled the "Louisiana Educational Facilities Asbestos Detection Program," it was functioning as an "arm" or "alter ego" of the State in bringing this lawsuit and should be afforded Eleventh Amendment immunity. As demonstrated below, however, the State of Louisiana did not intend to and cannot create "arms" of the State out of public and private schools throughout Louisiana by the enactment of this group of statutes.

The Louisiana Educational Facilities Asbestos Detection Program was enacted in 1981 in order "to provide a mechanism by which the presence of friable asbestos in the elementary and secondary school facilities occupied by the school children of this state can be detected."[45] These statutes were intended to assist schools in Louisiana in

---

removal to federal court of suit brought by state in state court); *California v. Steelcase, Inc.*, 792 F.Supp. 84 (C.D. Cal. 1992) (Eleventh Amendment applies to case brought by state in state court and removed to federal court). As discussed above, however, even if the Eleventh Amendment applies to removal from state court of a case initiated in state court by a state or its "alter ego" as plaintiff, the School Board is not the "arm" or "alter ego" of the State of Louisiana and does not qualify for Eleventh Amendment protection in this case.

45 La. R.S. § 17:3701.

detecting and abating, if necessary, asbestos-containing materials in school buildings.

However, application of the statutes was not in any way restricted to the public schools. Rather, the legislature specifically defined "school," as used in the statute to include public *and* private schools.[46] By extending the assistance afforded by the statutes to public and private schools, it is clear that the legislature never intended the enactment of this statute to create "arms" or "alter egos" of the State, bestowing Eleventh Amendment immunity to any school that sued to recover expenses incurred in connection with the act.

Significantly, as noted by petitioner, the statute provided that the Office of the State Attorney General *could* furnish legal advice "'upon the request of any city or parish school board.'"[47] However, as is plain from the language of the statute, this assistance is optional, not mandatory. In addition, "'[w]henever any civil suit initiated and conducted pursuant to [this section] results in the collection by the school board of monetary damages, the school board shall reimburse the attorney general, upon his request, for any

---

46 "Schools" are defined in the statute as "any elementary or secondary school in the state which has received approval from the department as provided in R.S. 17:10, or from the Board of Elementary and Secondary Education, as provided in R.S. 17:11, and which is conducted in a building constructed prior to 1972." La. R.S. § 17:3702. Louisiana Revised Statute 17:10 refers to the approval of *public* schools, which include schools under the supervision of Louisiana parish school boards. Louisiana Revised Statute 17:11 includes all "private elementary, secondary, or proprietary schools accredited in the State of Louisiana."

47 *See* Petition for Writ of Certiorari at pp. 14-15, *quoting* La. R.S. § 17:3713.

vouchered expenses and costs incurred in the conduct of the lawsuit not to exceed forty percent of the amount of the collected monetary damages.'"[48] Accordingly, although a school could invoke the assistance of the State in collecting funds for the school's own coffers, the school would be required to pay for any services provided by the State.[49] The statute essentially authorized the schools to hire the attorney general to assist in litigation *on a contingency fee basis*. This relationship does not reflect the status of "arm" or "alter ego" of the State. Rather, the emphasis is on the independent and separate nature of the schools in this context.

IV. With Few Exceptions, County, District, And City School Boards And Districts Are Not "Arms" Or "Alter Egos" Of Their Respective States.

With near unanimity, federal courts have found that local county (parish), district, and city school boards cannot be considered "arms" or "alter egos" of their respective states. In *Unified School District No. 480 v. Epperson, et al.*,[50] the Tenth Circuit concluded:

---

48 *Id.*

49 In this case, the School Board never elected to enlist the aid of the State Attorney General, but rather opted to pursue any recovery on its own.

50 551 F.2d 254 (10th Cir. 1977), revisiting Eleventh Amendment issue on remand, *Unified School District No. 480 v. Epperson*, 583 F.2d 1118 (10th Cir. 1978).

> Local unified school districts in Kansas can sue and be sued, execute contracts and hold real and personal property, and in general possess the "useful powers of a corporation for public purposes." For budgetary and taxing purposes, a local unified school district in Kansas is considered a municipality. The State of Kansas, as does the State of Ohio, furnishes substantial state aid to the local school districts, though the latter fix their own budgets and are empowered to levy and collect taxes within the local school district with which to fund their budget.[51]

In *Travelers Indemnity Company v. School Board of Dade County, Fla.*,[52] the Eleventh Circuit found that Florida county school boards were not arms of the state. Reaching the conclusion that nothing in the nature of a county school board in Florida entitles such a board *per se* to Eleventh Amendment protection, the court analyzed the status of the board in the particular context before the court.[53] Reviewing several cases that discuss awards of retroactive application, as opposed to prospective relief awarded in *Ex parte Young*, the court concluded that: "The more significant distinction is that *Edelman* makes it clear that the Eleventh Amendment protection is available only if satisfaction of the judgment sought against the state 'agency' *must* under all circumstances, be paid out of state funds,"

---

51 *Id.* at 259-60 (citations omitted).

52 666 F.2d 505 (11th Cir.), *cert. denied*, 459 U.S. 834, 103 S.Ct. 77 (1982).

53 *Id.* at 508.

concluding that the defendant board of education was not protected by the Eleventh Amendment.[54]

The Eleventh Circuit, in *Stewart v. Baldwin County Board of Education,*[55] determined that Alabama school boards were not "alter egos" of the state and, accordingly, did not enjoy Eleventh Amendment immunity. The *Stewart* court "placed considerable significance on the fact that the individual school boards had the means to raise funds, so that any judgment for the plaintiff could be paid out of local funding rather than out of the state treasury."[56]

In *Lester H. by Octavia P. v. Gilhool,*[57] the Third Circuit concluded that Pennsylvania school boards are not "alter egos" of the commonwealth of Pennsylvania, notwithstanding the fact that the commonwealth of Pennsylvania provided significant amount of funds for the local boards.

The Tenth Circuit, in *Ambus v. Granite Board of Education,*[58] concluded that Utah boards of education were not arms of the state. The fact that the boards received

---

54 *Id.* at 509 (emphasis in original). In the case before this Court, the issue of the potential for the state to pay any resulting judgment does not arise because the School Board is the plaintiff and no counterclaims have been asserted.

55 908 F.2d 1499 (11th Cir. 1990).

56 *Id.* at 1510.

57 916 F.2d 865 (3d Cir. 1990), *cert. denied,* 499 U.S. 923, 111 S.Ct. 1317 (1991).

58 975 F.2d 1555 (10th Cir. 1992), *affirmed on rehearing,* 995 F.2d 992 (1993).

some money from the state did not provide sufficient identity with the state in the analysis. Addressing the issue with regard to Wyoming school districts, in *Bertot v. School District No. 1,*[59] the Tenth Circuit again concluded that the school districts were not "arms" of the state to be afforded Eleventh Amendment immunity.

In *Adams v. Rankin County Board of Education,*[60] the Fifth Circuit concluded that Mississippi school boards were not afforded Eleventh Amendment immunity because they were locally controlled institutions supported largely by local revenues.

In *Rosa R. v. Connelly,*[61] the Second Circuit found that although the state board of education had "general supervision and control," the Connecticut local school boards were not "arms" of the state. The responsibility for implementing goals and maintaining the public school facilities themselves remain the responsibility of the local boards.

A multitude of district courts have concluded that state school districts possess sufficiently autonomous powers

---

59 613 F.2d 245 (10th Cir. 1979).

60 524 F.2d 928 (5th Cir. 1975), *cert. denied*, 438 U.S. 904, 98 S.Ct. 3121 (1978).

61 889 F.2d 435 (2d Cir. 1989), *cert. denied,* 496 U.S. 941, 110 S.Ct. 3225 (1990).

to remain political subdivisions that are not considered "arms" or "alter egos" of the state.[62]

Faced with the well-founded reasoning of so many courts considering empowerments of much less magnitude that the administrative and financial independence afforded the Orleans Parish School Board, petitioner cannot deny that at least in the context of this lawsuit, petitioner is not an "arm" or "alter ego" of the State of Louisiana.

V. The Constitutional Principles Discussed In The Recent Decisions In *Coeur D'Alene* and *Printz* Do Not Change The Outcome In the Instant Case.

Petitioner contends that it is asserting its alleged Eleventh Amendment immunity based upon recent pronouncements of this Court in *Idaho v. Coeur D'Alene Tribe of Idaho*[63] and *Printz v. United States*.[64] Neither of

---

62 *See Cline v. School District No. 32*, 476 F.Supp. 868 (D. Neb. 1979) (although Nebraska retained some supervisory interest and provided substantial aid, Nebraska school districts, with authority issue bonds and levy taxes, remained political subdivisions not immune from federal suit under the Eleventh Amendment); *Kenny v. Board of Trustees*, 563 F.Supp. 95 (D. Mont. 1983) (considering the state definition of the entity, the entity's autonomy, and the financial independence of the entity, Montana school districts were not arms of the state with Eleventh Amendment immunity); *Smith v. Travis County Educ. Dist.*, 791 F.Supp. 1170 (W.D. Tex. 1992) (characterization by the state court of the school district as an "agency" of the state did not rise to the level of "arm" of the state to equate with Eleventh Amendment immunity for Texas districts).

63 ___ U.S. ___, 117 S.Ct. 2028 (1997).

64 ___ U.S. ___, 117 S.Ct. 2365 (1997).

those cases provides any basis to revise the *Mt. Healthy* analysis or to contradict the Fifth Circuit's conclusions in *Moore* and *Minton*.

Indeed, in *Coeur D'Alene*, this Court expressly stated that it was not reconsidering its prior interpretations of the Eleventh Amendment.[65] Moreover, the decision in *Coeur D'Alene* depended upon facts and circumstances not present in the case now before the Court, *e.g.*, the application of the *Ex parte Young* exception to Eleventh Amendment immunity in the context of a claim for injunctive relief against a state and state officials to quiet title to what was claimed as state-owned land. Though individuals were sued, the object of the suit was "'to tie the hands of the State.'"[66]

Nor does the Court's opinion in *Printz* provide any relief to petitioners. The *Printz* case involved not the Eleventh, but the Tenth Amendment. The *Printz* court specifically noted that "the distinction in our Eleventh Amendment jurisprudence between states and municipalities is of no relevance here."[67]

The only consideration present in *Coeur D'Alene* and *Printz* that relates to this case is the Court's recognition of the dignity and status of statehood. This is nothing new. The dignity of the state has always been the underlying factor in this Court's interpretation of the Eleventh

---

65 117 S.Ct. at 2033 ("We adhere to our precedent."); *id.* at 2034 ("We do not, then, question the continuing validity of the *Ex parte Young* doctrine.").

66 *Id.* at 2034 (citation omitted).

67 117 S.Ct. at 2382, n.15.

Amendment. The dignity of the State of Louisiana is not at issue in this proceeding, brought by a Louisiana parish school board in the exercise of its local powers as a political subdivision and not an arm of the State.

CONCLUSION

Although the Louisiana State Board of Elementary and Secondary Education, BESE, has general supervision and control of the Louisiana parish school boards, BESE is expressly prohibited by statute from exercising any control over administration or management. At all times, the Orleans Parish School Board had complete responsibility for maintaining the local public school facilities themselves. This lawsuit arose out of petitioner's exercise of that specific local and independent authority. Moreover, the state itself will not be called upon to pay any judgment arising out of this lawsuit. Because under the principles articulated by this Court in *Mt. Healthy* and by the Fifth Circuit in *Moore* and *Minton*, petitioner cannot be considered an "arm" or "alter ego" of the State for any purpose, respondent W.R. Grace & Co.-Conn. respectfully requests that this Court deny

petitioner Orleans Parish School Board's Petition for Writ of Certiorari.

Respectfully submitted,

James C. Gulotta, Jr.*
Barry W. Ashe
Mary L. Dumestre
Counsel for Respondent
W.R. Grace & Co.-Conn.
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, Louisiana 70130
(504) 581-3200

*Counsel of Record

Appendix

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ORLEANS PARISH SCHOOL BOARD

VERSUS

UNITED STATES GYPSUM COMPANY, ET AL

ORDER AND REASONS

The motion for leave to amend complaint and the motion to remand filed on behalf of plaintiff, Orleans Parish School Board, were considered this date on memoranda. For the following reasons, both motions are DENIED.

On August 31, 1988, plaintiff filed suit in state court naming twenty-three manufacturers, thirteen contractors, and five architects as defendants. All of the manufacturer defendants were alleged to be citizens of states other than Louisiana, while all of the contractor and architect defendants were alleged to be citizens of Louisiana. The contractor defendants were named only as defendants "A, B, C, D, E, F, G, H, I, J, K, L and M."

On January 6, 1989, prior to service on any of the defendants, National Gypsum Company, one of the manufacturer defendants, removed the suit based on diversity of citizenship. Although the contractor and architect defendants were alleged to be citizens of Louisiana, National Gypsum claimed that they were fraudulently joined;

therefore, complete diversity existed. Since the date of removal, the parties have engaged in extensive discovery and have participated in numerous status conferences.

Plaintiff now seeks to amend its complaint to name additional twenty-seven non-diverse architects as defendants and to have the action remanded back to state court.

MOTION TO AMEND COMPLAINT

Plaintiff seeks to amend its complaint to add an additional twenty-seven non-diverse architect defendants. The applicable statute provides that "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." 28 U.S.C. § 1447(e).

In Hensgens v. Deere & Co., 833 F. 2d 1179 (5th Cir. 1987), the Fifth Circuit set forth the principles to be applied to determine whether the court should allow an amendment to add non-diverse defendants, requiring the suit to be remanded. There are three prime considerations: "the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, [and] whether plaintiff will be significantly injured if amendment is not allowed . . . ." Id. at 1182.

Plaintiff fails all three tests: it is apparent that the purpose of the proposed amendment at issue is to defeat federal jurisdiction; plaintiff has been dilatory in waiting over a year from the date that the suit was removed to file its motion for leave to amend complaint; and plaintiff will not be significantly injured if amendment is not allowed.

Plaintiff is free to file suit against the additional architects in state court. We exercise the discretion given to us by 28 U.S.C. § 1447(e) and deny plaintiff's motion for leave to amend.

MOTION TO REMAND

Plaintiff argues that because all defendants did not join in the removal petition, they are now procedurally barred from doing so, and they have no right to oppose the motion to remand. Plaintiff chose not to serve any of the defendants after filing suit in state court, and National Gypsum Company removed the suit before any of the defendants were served.

Only properly joined defendants who are served at the time the removal petition is filed must join in it. See Pullman Co. v. Jenkins, 305 U.S. 534, 59 S.Ct. 347 (1939). Defendants who are not served at the time the removal petition is filed need not join in it. Getty Oil Corp. v. Insurance Co. of North America, 841 F.2d 1254, 1261 n.9 (5th Cir. 1988). Unserved defendants can either accept removal by doing nothing or, after they are served, can move to remand pursuant to 28 U.S.C. § 1448. Id. at 1262-63. In the instant case, no defendant has objected to removal.

Moreover, even if there were any procedural defects in the removal procedure, plaintiff has waived its right to complain of such defects. The failure of all defendants to join in the removal petition is considered a procedural defect. Id. at 1263; Johnson v. Helmerich & Payne, Inc., 892 F.2d 442 (5th Cir. 1990); Santa Rosa Medical Center, Inc. v. Converse of Puerto Rico, Inc., 706 F.Supp. 111 (D.P.R. 1988). 28 U.S.C. § 1447(c) provides, in pertinent

part, "A motion to remand the case on the basis of any defect in the removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a)." In the instant case, plaintiff waited nearly a year before filing its motion to remand.

Plaintiff also argues that the presence of the fictitiously named contractor defendants in its state court petition defeats diversity and compels remand. 28 U.S.C. § 1441(a) was recently amended to state, in pertinent part, "For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded."

While the amendment to 28 U.S.C. § 1441(a) became effective after plaintiff filed its state court petition, the amendment has uniformly been retroactively applied to cases pending when the amendment took effect. Bryant v. Ford Motor Co., 886 F.2d 1526 (9th Cir. 1989); Kruso v. International Telephone & Telegraph Corp., 872 F.2d 1416 (9th Cir. 1989); Cowan v. Central Reserve Life of North America Insurance Co., 703 F.Supp. 64 (D. Nev. 1989). We apply the statute and disregard the fictitiously named contractor defendants in determining that complete diversity exists.

Finally, plaintiff argues that the suit should be remanded, contending that the architect defendants named in the state court petition were not fraudulently joined.

Until it filed its remand motion, plaintiff never took issue with the allegation in the removal petition that the architects were fraudulently joined. Instead, plaintiff engaged in extensive discovery, participated in status conferences, and waited almost a year to file its remand

motion. In so doing, plaintiff has tacitly conceded that the architect defendants named in the state court petition were fraudulently joined. We conclude that such participation in this court constitutes a waiver of plaintiff's right to contest defendants' claim of fraudulent joinder. See Johnson v. Helmerich & Payne, Inc., 892 F.2d 422 (5th Cir. 1990); Harris v. Edward Hyman Co., 664 F.2d 943 (5th Cir. 1981) (per curiam).

As an additional basis for ignoring for diversity purposes the "architect defendants", all of which are allegedly corporations, we note that it is undisputed that not one of those named in the state court petition actually exists.

New Orleans, Louisiana, this 26th day of March, 1990.

/s/ Adrian G. Duplantier
UNITED STATES DISTRICT JUDGE

APPENDIX B

November 4, 1993

MEMORANDUM TO
COUNSEL OR PARTIES LISTED BELOW

Nos. 90-3318 & 90-3421 - *Orleans Parish School Board v. U.S. Gypsum Co., et al.*

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, FRAP and Local Rules 39 and 41 govern costs, petitions for rehearing and mandates. A petition for rehearing must be filed in the Clerk's Office within fourteen (14) days from this date. Placing the petition in the mail on the 14th day will not suffice.

The judgment entered provides that plaintiff-appellant pay to defendants-appellees the costs on appeal.

Very truly yours,

CHARLES R. FULBRUGE III, Clerk

Enclosure
All counsel of record

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 90-3318 & 90-3421

ORLEANS PARISH SCHOOL BOARD,

Plaintiff-Appellant,

versus

U.S. GYPSUM CO., ET AL.,

Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Louisiana
(CA-89-0070-"H"(2))

Before REYNALDO GARZA, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:*

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Defendants removed this case to federal court, relying on the diverse citizenship of the parties. There was complete diversity of citizenship when the case was removed. Much later, the school board sought leave to amend and add one or more parties whose presence would destroy diversity and defeat federal jurisdiction. The district court stated reasons for refusal to grant leave. See 28 U.S.C. 1447(e). We find no error and affirm.

AFFIRMED.